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No. 06-726

In the Supreme Court of the United States

E.I. DU PONT DE NEMOURS AND COMPANY, *ET. AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* SUPERFUND SETTLEMENTS PROJECT, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, AND UNITED STATES CONFERENCE OF MAYORS IN SUPPORT OF PETITIONERS

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The Superfund Settlements Project, American Chemistry Council, American Petroleum Institute, National Association of Manufacturers, and United States Conference of Mayors submit this *amici curiae* brief in support of petitioners.[1]

[1] In accordance with Rule 37.6, this brief is not authored in whole or in part by counsel for any party. No person or entity other than *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

INTEREST OF THE *AMICI CURIAE*

Amici curiae all share a vital interest in the Superfund cleanup program and its effective implementation. The trade association *amici curiae*—Superfund Settlements Project, American Chemistry Council, American Petroleum Institute, and National Association of Manufacturers—represent diverse sectors of American industry. For more than twenty-five years, their member companies have been actively involved in performing cleanups at hundreds of contaminated sites throughout the United States where other parties are responsible for a substantial share of the contamination. The cumulative cost of those cleanups is well in excess of $10 billion. The right to collect from those other parties their equitable shares of the cleanup costs is critical to *amici*'s member companies performing such cleanups. (This right is referred to throughout this brief as "the right of contribution," a term that encompasses contribution and cost recovery claims under CERCLA.) For *amicus* United States Conference of Mayors, on the other hand, the prompt and effective cleanup of contaminated sites is critical to the economic well-being of many of our nation's cities. As such, disposition of the issue raised in this case will have a direct effect on each of the *amici curiae* and on their member companies and constituents.

The Superfund Settlements Project ("SSP") is a non-profit association of major corporations with substantial experience in the Superfund program. The SSP is dedicated to improving the implementation of CERCLA by reducing barriers to settlement, minimizing transaction costs, and using existing legal authorities to make the program faster, fairer, and more efficient. To date, SSP's member companies have spent more than $6 billion on site cleanups.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC is committed to improving environmental, health, and

safety performance through its Responsible Care© industry initiative, common sense advocacy designed to address major public policy issues, health and environmental research, and product testing. To date, ACC member companies also have spent billions of dollars on Superfund cleanups.

The American Petroleum Institute ("API") is a nationwide, not-for-profit trade association representing nearly 400 member companies engaged in all aspects of the oil and natural gas industry, including exploration, production, transportation, refining, distribution, and marketing. API frequently represents its members on important legal and policy matters before the courts, agencies, and legislative bodies. API's members are or have been directly involved in the remediation—including voluntary remediations—of numerous sites under CERCLA, often at great economic cost. As such, API's member companies have a strong interest in maintaining the right of contribution provided for in CERCLA.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards. Like the other trade association *amici*, NAM's member companies have a strong interest in the disposition of this matter as its member companies have incurred enormous costs conducting Superfund cleanups.

Absent this Court's intervention, many member companies of the trade association *amici* will find themselves in an untenable position. For those companies already in the process of performing costly cleanups for which they should be only partially responsible, the decision of the United States

Court of Appeals for the Third Circuit will deny them the only effective means of obtaining equitable contribution from other parties who are potentially responsible for the contamination. Additionally, the Third Circuit's decision will create a disincentive to perform future cleanups. Ultimately, the member companies of the trade association *amici curiae* will face increased and unnecessary litigation and other transaction costs.

By discouraging or delaying the cleanup of thousands of contaminated sites, the Third Circuit's decision also will directly impede the redevelopment of many of our nation's cities. For this reason, *amicus curiae* United States Conference of Mayors joins in this brief. The Conference of Mayors is the official nonpartisan organization of cities with populations of 30,000 or more. The Conference of Mayors has been on the forefront on the issue of brownfields redevelopment for over 15 years, seeking public and private sector solutions to this nationwide problem. The United States Conference of Mayors Metro Economies Report verified that cities and the metropolitan areas play a dynamic role in our nation's economy, representing more than 80% of employment, income and the production of goods and services in the United States. Brownfields redevelopment plays an integral role in these numbers with an increase in jobs, property value, taxes, and tourism. The Conference of Mayors thus has a significant interest in the disposition of this matter as the right of contribution provided for in CERCLA is critical to brownfields redevelopment.

In addition to these practical considerations, the Third Circuit's decision also is in direct conflict with decisions by unanimous panels of the Second and Eighth Circuits. *See Consol. Edison Co. of N.Y. v. UGI Util. Inc.*, 423 F.3d 90 (2d Cir. 2005), *petition for cert. pending*, No. 05-1323 (filed Apr. 14, 2006); *Atl. Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), *petition for cert. pending*, No. 06-562 (filed

Oct. 24, 2006). Without review by this Court, this conflict will persist, causing needless uncertainty and resulting in unnecessary litigation. Ultimately, this ongoing conflict will discourage future cleanups and thus is detrimental to the fundamental objectives of CERCLA. Indeed, in its petition for a writ of certiorari in *Atlantic Research*, the United States acknowledges that this continued uncertainty is detrimental to the effective implementation of CERCLA and thus this Court's intervention "is warranted now in order to provide definitive resolution on this important question . . . ." Petition of United States for Writ of Certiorari at 26, *United States v. Atl. Research Corp.*, No. 06-562 (filed Oct. 24, 2006). For that same reason, respondents support review in this case as well. Brief for Respondents 2, 9, 15.

Rather than presenting additional argument on the legal issues or further discussing the conflict among the circuits that the Third Circuit's decision has caused, both of which are adequately addressed by petitioners, *amici curiae* instead will describe some of the intensely practical considerations that should inform the Court's decision to grant certiorari. In particular, *amici curiae* demonstrate that because the Third Circuit's decision significantly narrows the right of contribution, it will discourage and delay the cleanup of the many thousands of contaminated sites across the country. Given the serious environmental and health risks posed by many of these sites, this Court's review of the Third Circuit's decision is critical.

SUMMARY OF ARGUMENT

As this Court previously recognized, CERCLA was enacted to achieve an overriding objective: to facilitate the prompt and effective clean up of contaminated sites. The success of this effort continues to be a national priority given the many thousands of contaminated sites around the country and the enormous cost of cleaning them up.

To encourage the expeditious and equitable cleanup of these sites, Congress provided parties facing potential liability with a right of contribution in CERCLA. This right of contribution is integral to achieving CERCLA's goal because it gives a private party undertaking a cleanup the right to recover its response costs beyond its equitable share from other responsible parties—a critical incentive to initiate the cleanup process. The Third Circuit's decision is directly contrary to this objective and inevitably will discourage and delay cleanups. The Third Circuit's decision also will increase litigation, burdening courts and regulatory agencies with needless claims, and inflicting higher transaction costs on all concerned. Absent the Court's intervention, the uncertainty regarding the right of contribution caused by the Third Circuit's decision will undermine CERCLA's fundamental objective to facilitate the expeditious remediation of contaminated sites.

Inevitably, the Third Circuit's decision will impede the national effort to clean up contaminated sites. Cleanup of the thousands of sites contaminated by departments and agencies of the United States government will be forestalled or fall inequitably and unfairly on the shoulders of a few private parties. Cleanup of the thousands of corrective action sites contaminated by decades of industrial activity will be discouraged and delayed. And the cleanup of many thousands of brownfields sites found throughout our inner cities and working-class communities will be needlessly postponed.

ARGUMENT

THE THIRD CIRCUIT'S DECISION DENYING THE RIGHT OF CONTRIBUTION WILL DISCOURAGE AND DELAY THE CLEAN-UP OF CONTAMINATED SITES, FRUSTRATING THE CENTRAL PURPOSE OF CERCLA.

In 1980, in response to the new and frightening problem of abandoned toxic waste sites,[2] Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").[3] *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998). An overriding objective of CERCLA was to achieve the swift and effective cleanup of contaminated sites, with the attendant goal to make those responsible pay for the cleanups. *See, e.g., Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994) (stating that one of CERCLA's main goals was to "'encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others'") (quoting *FMC Corp v. Aero Industries, Inc.*, 998 F.2d 842, 847 (10th Cir. 1993)). Indeed, as this Court has recognized, "[t]he remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the cost of cleanup." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989) (plurality opinion of Brennan, J.), *overruled on other grounds*, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

To help achieve this ambitious goal, CERCLA combined the individually harsh elements of retroactive liability, strict liability, and joint and several liability into an unprecedented

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[2] *See generally* John Quarles & Michael W. Steinberg, *The Superfund Program at Its 25th Anniversary*, 36 Envtl. L. Rep. (Envtl. L. Inst.) 10364 (2006).

[3] 42 U.S.C. § 9601 *et seq.*

legal framework that is aptly described as Draconian.[4] Within CERCLA's web of often disproportionate and potentially unjust liability, there is but one feature that holds out a promise of fairness and provides an incentive for private parties to move forward swiftly to clean up sites: the right to seek equitable contribution from other responsible parties. This right of contribution is integral to achieving CERCLA's goal, for it gives a private party a critical incentive to initiate the cleanup process.

From the inception of the Superfund program, EPA viewed this right of contribution as critical to encouraging private parties to perform cleanups. EPA's vision of CERCLA was highly pragmatic. Government simply does not have the resources to address all of the contaminated sites, nor is it always able to address those sites quickly or efficiently. Accordingly, as early as 1984, EPA was implementing CERCLA based on an essential principle: It is "preferable for private parties to conduct cleanups themselves." Lee M. Thomas and F. Henry Habicht II, U.S. EPA, *Interim CERCLA Settlement Policy* (OSWER Directive No. 9835.0) (1984).

Building on this rationale, EPA committed itself to "remove or minimize if possible the impediments to voluntary cleanup." *Id.* EPA also pledged to support in court the equitable claims of those who performed cleanups against those who declined to participate. To this end, in 1990, EPA amended the National Contingency Plan ("NCP") that governs Superfund cleanups, adding a new Subpart H for the express purpose of clarifying how private parties should go about performing cleanups with the goal of recovering their costs

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[4] Although CERCLA does not expressly state the standard of liability, the courts generally have construed CERCLA § 107 liability to be retroactive, strict, and joint and several. *See, e.g., In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 901-02 (5th Cir. 1993); *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985).

from other parties through contribution litigation. *See* 40 C.F.R. pt. 300, subpt. H. (2006).

EPA explained its new Subpart H rules with reference to these core policies:

> EPA believes that it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination.[5]

National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 55 Fed. Reg. 8666, 8792-93 (1990) (codified at 40 C.F.R. pt. 300, subpt. H (2006)). EPA also took pains to state that PRPs who clean up sites may seek to recover their costs before completing their cleanups because "requiring a party to incur *all* costs before bringing a cost recovery action may discourage and delay cleanups, contrary to the intent of Congress that sites be cleaned up *expeditiously*." 55 Fed. Reg. 8666, 8798 (1990) (emphasis supplied).

EPA's reliance on the right of contribution as a powerful incentive has proven to be highly successful, resulting in cleanup settlements with a cumulative value in excess of $20 billion. Today, it is common for companies to agree to perform the entire cleanup at a contaminated site, even though their fair share of the problem may be relatively modest.[6] Over 70% of the new Superfund cleanups each year are

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[5] At the time the EPA made this statement, contribution actions under CERCLA were frequently referred to as "cost recovery actions." *See, e.g., City of Phila. v. Stepan Chem. Co.*, 544 F. Supp. 1135, 1142-43 (E.D. Pa. 1982).

[6] A recent study by the Environmental Law Institute reported that cleanups were also underway at over 15,000 non-NPL sites under the auspices of state cleanup programs. *See* John Pendergrass, *An Analysis of State Superfund Programs: 50-State Study, 2001 Update* (ELI) 16-17 (2002).

launched through agreements such as these.[7] These agreements are possible precisely because companies know that they can seek equitable contribution from those who do not consent to participate.[8] Moreover, companies that refuse to participate know that they can be held liable for their equitable shares. But for this right of contribution, companies would resist undertaking new cleanup obligations.

By denying this right of contribution, the Third Circuit's decision thus discourages and delays the very cleanups that Congress sought to encourage. *See, e.g., Syms v. Olin Corp.*, 408 F.3d 95, 106 n.8 (2d Cir. 2005) (observing that denying contribution rights "create[s] a perverse incentive for PRPs to wait until they are sued before incurring response costs"); *Consol. Edison*, 423 F.3d at 100 (stating that "discouraging voluntary cleanup . . . undercut[s] one of CERCLA's main goals"). As a result, EPA and its state agency counterparts will be required to rely primarily on litigation to achieve progress at contaminated sites. Yet the federal and state governments lack the resources necessary to initiate litigation for every site, and thus far fewer cleanups will take place. Even where litigation is pursued, far greater judicial and administrative resources would be consumed, and higher transaction costs will be inflicted on all concerned. Inevitably, the pace of progress will be slowed.

It has been suggested that cleanups might not be discouraged because some companies might be able to seek contribution under state law. *See, e.g., Aviall Servs., Inc. v. Cooper*

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[7] U.S. EPA, *Superfund Accomplishment Figures, Summary Fiscal Year (FY) 2003*, http://www.epa.gov/superfund/action/process/numbers.htm (last visited December 18, 2006).

[8] *See, e.g., Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (implicitly allowing contribution action to proceed without state or federal precursor action of any kind); *Westfarm Assoc. Lim. Part. v. Washington Suburban Sanitary Comm.*, 66 F.3d 669, 677 (4th Cir. 1995) (same).

Indus., Inc., 263 F.3d 134, 145 (5th Cir. 2001), *rev'd*, 312 F.3d 677 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157 (2004). But this suggestion is extremely optimistic for several reasons.[9] First, CERCLA may preempt state-law contribution claims in situations where no recovery would be available under CERCLA itself. *See, e.g., In re Reading*, 115 F.3d 1111, 1117 (3d Cir. 1997) (state common law claims for contribution and restitution preempted by CERCLA's statutory right of contribution); *Bedford Affiliates v. Sills*, 156 F.3d 416, 427 (2d Cir. 1998) (state common law restitution and indemnification actions preempted by CERCLA's carefully crafted settlement system). Second, many suits seeking contribution from the United States under state law would be barred by sovereign immunity because CERCLA waives that immunity for state-law claims only at facilities "owned or operated by" federal agencies. 42 U.S.C. § 9620(a)(4). Many privately-owned sites—including the sites at issue in this case—are heavily contaminated with wastes contributed by the United States, yet the parties cleaning up those sites would have no recourse under state law because the sites are not "owned or operated by" federal agencies. Third, vexing choice-of-law questions would bog down many state-law contribution claims, as state law varies widely from one jurisdiction to the next on such key issues as what hazardous substances are covered, which parties may be held liable, when contribution may be sought, and what costs may be recovered. In sum, the patchwork of state-law contribution

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[9] *See, e.g.*, John M. Hyson, *Contribution Claims Under Section 113(f)(1) of CERCLA*, 32 Envtl. L. Rep. (Envtl. L. Inst.) 10151, 10155 (2002) (noting that the Fifth Circuit panel opinion in *Aviall Services, Inc. v. Cooper Industries, Inc.* "fails to explain why a Congress, bent on *encouraging* voluntary cleanups, would relegate cost recovery actions by volunteers to state courts") (emphasis in original, footnote omitted).

rights cannot plausibly be viewed as a substitute for the right of contribution that Congress conferred in CERCLA.[10]

In order to demonstrate the severe negative effects of denying the right of contribution, *amici* describe below four important categories of cleanups that will be discouraged and/or delayed by the Third Circuit's decision. These are: (1) sites polluted by the federal government, (2) RCRA corrective action sites, (3) Superfund site investigations, and (4) brownfields sites.

A. Sites Polluted by the Federal Government.

The Third Circuit's decision will produce uniquely unjust results at the many thousands of sites—including the sites at issue in this case—that have been contaminated by the departments and agencies of the United States itself. These include not just the sites actually owned and operated by the United States, but also the many private sites to which the United States contributed waste.

The docket of contaminated sites owned and operated by the federal government is staggering.[11] The United States owns and manages half a billion acres of land containing more than 60,000 potentially contaminated sites. Among these sites are former nuclear weapons production facilities,

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[10] Moreover, many state law statutes are modeled on CERCLA and thus contain nearly identical contribution provisions. Accordingly, they do not provide an independent or supplemental basis for seeking contribution. *See, e.g., Hicks Family v. 1st Nat'l Bank of Howell*, 2006 Mich. App. LEXIS 2933, at *17-23 (Mich. App. Ct. Oct. 3, 2006) (finding that the contribution provisions of Michigan's Natural Resources and Environmental Protection Act were subject to the same requirements imposed by the nearly identical language of CERCLA's contribution pro-visions).

[11] *See Deep Pockets: Taxpayer Liability for Environmental Contamination*, Committee Print No. 2, Subcommittee on Oversight & Investigations, Committee on Natural Resources, House of Representatives, 103d Cong., 1st Sess. (1993).

military bases, abandoned mines, landfills, and underground storage tanks.[12] According to the Government itself, the total cleanup cost for these sites is estimated to be at least $230 billion, and might be nearly twice that amount.[13]

Also of enormous significance is the docket of privately-owned sites—such as those at issue in this case—with contamination resulting in whole or in part from the activities of the federal government. These sites include waste oil recycling facilities that primarily served military bases,[14] nuclear fuel processing plants that helped support the Cold War weapons production programs,[15] and disposal sites that accepted large volumes of waste from the government.[16]

EPA and state regulatory agencies seek to expedite the cleanups at these sites, but they are often unable to sue the federal department or agency that helped to create the problem.[17] Instead, they approach private companies that

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[12] According to a government estimate, a total of 60,425 potentially contaminated sites are present on land owned by the Departments of Agriculture, Defense, Energy, and Interior. Federal Facilities Policy Group, *Improving Federal Facilities Cleanup* 17 (Oct. 1995).

[13] Government estimates range from $234 billion to $388 billion in cleanup costs. *Id.*

[14] The Bridgeport Rental and Oil Services Superfund site in Logan Township, New Jersey is a good example. The site included a 13-acre oil lagoon containing high levels of PCBs. Most of the oil originated at the Philadelphia Naval Shipyard.

[15] *See, e.g., Westinghouse Electric Co. v. United States*, No. 4:03CV00861 SNL (E.D. Mo., filed June 26, 2003) (CERCLA complaint seeking contribution for cleanup of radioactive and hazardous contamination at former Hematite nuclear fuel processing plant in Festus, Missouri).

[16] For example, the Stringfellow Acid Pits site near Los Angeles, California counted nearby military installations among its major customers.

[17] EPA is often prevented from suing other federal agencies under CERCLA because the Department of Justice views such cases as conflicts within the Executive Branch that present no justiciable case or controversy under Article III of the Constitution. States seeking to compel

also share the liability at these sites, hoping the companies will agree to undertake the cleanups themselves. Companies, however, cannot reasonably be expected to undertake these massive cleanups unless they are confident that they can swiftly obtain equitable contribution from the United States.

Thus, absent this Court's intervention, the Third Circuit's decision will discourage companies from performing such cleanups. This will present EPA and its state agency counterparts with a Hobson's choice. Because EPA and the states typically cannot sue the federal agencies to compel them to clean up these sites, they either will have to sue private companies to clean up these sites, thereby burdening the courts with needless claims, or else these cleanups will have to wait. Neither result can be squared with the central purpose of CERCLA.

Perhaps even more troubling, if the Third Circuit's decision were permitted to stand, then the government could, as the Eighth Circuit recognized, "insulate itself from responsibility for its own pollution by simply declining to bring a CERCLA cleanup action or refusing a liable party's offer to settle." *Atl. Research*, 459 F.3d at 837. Moreover, "[t]his bizarre outcome would eviscerate CERCLA whenever the government, itself, was partially responsible for a site's contamination." *Id.*

Given the staggering number of contaminated sites owned and operated by the federal government and the many private sites at which the government is responsible for at least some of the contamination, it is vitally important that this Court grant review in order to provide definitive resolution that CERCLA provides a predictable right of contribution.

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cleanup are often prevented from suing the same federal agencies under state law, due to the doctrine of sovereign immunity. CERCLA waives that immunity only at facilities "owned or operated by" federal agencies. 42 U.S.C. § 9620(a)(4).

B. RCRA Corrective Action Sites.

Thousands of contaminated sites, including most of the sites at issue in this case, are being addressed through the corrective action program under Subtitle C of the Resource Conservation and Recovery Act ("RCRA"). This program includes more than 6,500 industrial facilities that handle, or formerly handled, hazardous wastes and are often heavily contaminated after decades of industrial operations.[18]

In 1984, Congress mandated that these facilities undergo "corrective action."[19] Corrective action—another term for cleanup of past contamination—is typically implemented either through RCRA permits or through RCRA administrative orders on consent. These RCRA permits and orders are generally issued to the current site owners by state environmental regulatory agencies. The site owners may elect to challenge the cleanup plans selected by the agencies, or they may instead choose to perform the work without a contest.

Site owners performing corrective action often seek contribution from other parties. In the typical case, an industrial facility has been operated successively by two or more companies over many decades. RCRA, however, generally looks only to the *current* owner to perform the cleanup, *see, e.g.*, RCRA § 3013, 42 U.S.C. § 6934, even though it may be a *previous* owner who contributed most of the contamination at the site. Thus, the right of contribution thus is a critical

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[18] *See* United States EPA, *Corrective Action: Basic Information*, http://www.epa.gov/epaoswer/hazwaste/ca/backgnd.htm#4 (last updated Feb. 22, 2006).

[19] Section 3004(u) of RCRA provides that permits issued after enactment of the 1984 Amendments "shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit." 42 U.S.C. § 6924(u).

consideration for a company about to undertake a costly RCRA corrective action project. Although RCRA itself contains no express provision for contribution, courts have approved the use of CERCLA to recover costs incurred in cleaning up RCRA corrective action sites. *See, e.g., United States v. Rohm & Haas, Inc.*, 2 F.3d 1265, 1272-75 (3d Cir. 1993), *overruled on other grounds*, *United States v. E. I. Du Pont de Nemours and Co.*, 432 F.3d 161 (3d Cir. 2005) (*en banc*). But the Third Circuit's decision denying the right of contribution eliminates a critical incentive for sites owners to implement RCRA corrective actions.

C. Superfund Sites.

The Third Circuit's decision also will prevent a responsible company from seeking equitable contribution toward the often considerable costs of investigating the nature and extent of contamination at a Superfund site and determining the most appropriate method of cleanup. These site studies, collectively referred to as a Remedial Investigation and Feasibility Study ("RI/FS"), *see* 40 C.F.R. § 300.430 (2006), are typically performed pursuant to an administrative order on consent issued under section 104 of CERCLA. *See* 42 U.S.C. § 9604. These studies are essential to the development and selection of an appropriate cleanup plan, regardless of who will perform the actual cleanup.

In many cases, RI/FS studies take years to perform and cost several million dollars. Without the right of equitable contribution, many companies will be much less willing to enter into administrative orders on consent to perform these critical studies. Either EPA will have to resort to litigation in order to coerce the work, or else the work will, again, have to wait. Neither result comports with CERCLA's overriding objective.

D. Brownfields Sites.

Finally, the Third Circuit's decision will delay cleanup of the many thousands of so-called "brownfields" sites around the country. These former industrial sites are heavily concentrated in our cities, and are smaller, and less contaminated than, the roughly 1,240 Superfund sites that EPA is addressing though its National Priorities List. Because most of these sites are not so contaminated as to present major threats to human health or the environment, federal and state regulators simply will never get around to ordering or performing cleanups. The only realistic potential for cleaning up these sites is voluntary action by responsible parties. Yet the disincentives to voluntary cleanups remain daunting.

Because these sites are contaminated, and because cleanup standards are uncertain and constantly changing, potential reuse or redevelopment of the land is unattractive. Fear of future liability also chills the desire to perform cleanups for reuse or redevelopment. Consequently, the cities in which they are located forfeit vital property taxes and other economic benefits that go hand in hand with redevelopment.

In order to reverse these conditions, the federal and state governments have enacted a host of programs over the past few decades. The most recent of these programs is the Brownfields Revitalization and Environmental Restoration Act of 2001, which provides new incentives to help spur redevelopment. *See* Pub. L. No. 107-118, Tit. II, 115 Stat. 2356 (2002). Among these new incentives is partial immunity from CERCLA liability for prospective purchasers of contaminated property, for property owners whose land is contaminated by pollutants migrating from contiguous properties, and for landowners who clean up property under a state cleanup program. With the Brownfields Act, the government seeks to encourage private industry to undertake cleanups and thereby trigger redevelopment. CERCLA's right of contribution plays a significant complementary role

in this effort as it encourages companies to perform the cleanups and postpones disputes over response costs. Denying the right of contribution, as the Third Circuit's decision does, is contrary to this larger public policy and undermines the very cleanups that Congress seeks to encourage.

To summarize, the Third Circuit's decision will have extremely detrimental consequences. At sites polluted by the federal government, the options for EPA and its state counterparts boil down to more litigation or slower cleanups—or both. The owners of sites in the RCRA corrective action program will be reluctant to perform cleanups under permits or administrative orders. Companies involved at Superfund sites may decline to perform RI/FS studies, ultimately delaying cleanup of these sites. Finally, companies will not voluntarily clean up brownfields sites, for fear that they will have no right to recoup their costs from others.

The Third Circuit's decision denying the right of contribution thus undermines the fundamental congressional objectives of achieving the prompt and efficient cleanup of contaminated sites and forcing responsible parties to bear their equitable share of the cost of their pollution. As such, this case presents an important and recurring question that demands this Court's review. Indeed, the sheer magnitude of these issues underscores the need for this Court's immediate intervention. Accordingly, *amici curiae* urge this Court's review of the Third Circuit's decision. Respondents support the granting of the petition and agree that "prompt review is desirable." Brief for Respondents 14.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

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